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Great Northwest Builders, LLC and International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 29, AFL-CIO. Case 36-CA-8799

June 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

The General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. Upon a charge filed by International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 29, AFL-CIO, on December 29, 2000, the General Counsel issued a complaint on March 27, 2001,¹ against Great Northwest Builders, LLC. The complaint alleged that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire employee applicant Jeffrey Carlson and by laying off and refusing to recall employee Robert Clerihew. On April 12, 2001, the Respondent filed an answer denying those allegations.

On July 10, 2001, counsel for the General Counsel, the Charging Party, and the Respondent entered into an informal settlement agreement that was approved by the Regional Director for Region 19. The settlement agreement provided, *inter alia*, that the Respondent would make Carlson and Clerihew whole by paying Carlson \$6384 and Clerihew \$6,357.58 in backpay. The Respondent was to pay each of them a partial payment of \$2548 on the date of the agreement, and the remainder in a series of monthly installment payments. The settlement also provided that:

In consideration of the Board granting a time-payment schedule, Respondent further agrees that, in the event of any non-compliance by failure to make required payments on the dates specified, or to cure any such failure within ten days of the specified payment date, the total amount of backpay plus interest¹ shall become immediately due and payable. Time is of the essence. Respondent agrees that after fourteen days notice from the Regional Director of the National Labor Relations Board, on Motion for Summary Judgment by the General Counsel, Respondent's Answer to the instant Complaint shall be considered withdrawn and no new Answer may be filed. Thereupon, the Board may issue an order requiring Respondent to show cause why said Motion of the General Counsel should not be granted. The Board may, without necessity of trial,

find all allegations of the Complaint to be true, and make findings of fact and conclusions of law consistent those allegations adverse to Respondent on all issues raised by the pleadings. The Board may then issue an Order providing full remedy as to the conduct alleged in the Complaint, with total backpay fixed in the amount of \$7947 for Robert Clerihew and \$7980 for Jeff Carlson, plus interest accruing since the day of this settlement. The parties further agree that a Board Order and U.S. Court of Appeals judgment may be entered thereon *ex parte*.

¹ Interest rate shall be the Board's interest rate as amended quarterly.

Shortly thereafter, the Respondent violated the terms of the agreement. Although the Respondent made the initial partial payment to both Carlson and Clerihew, the checks representing the first of the installment payments, in August 2001, were returned to Carlson's and Clerihew's banks because of insufficient funds. The Respondent also failed to inform the Region where it had posted the required notice. The Region's subsequent attempts to verify the posting revealed that the Respondent was no longer operating out of the location stated in the complaint, and the Region was unable to locate the Respondent.

On September 27, 2001, the Region sent copies of a letter to the Respondent to three addresses: the address stated on the Charge, the Respondent's address as of the date of the settlement agreement, and the address of the Respondent's owner and registered agent, Geno Solias. The letter informed the Respondent of its failure to comply with the terms of the settlement agreement, in specifics, and informed it that the Region would file a Motion for Summary Judgment if the Respondent did not immediately contact it. On October 9, 2001, the Region sent the same letter to two additional addresses resulting from its investigation. The letter sent to the Respondent's address as of the date of the settlement agreement was returned on October 15 for insufficient address, and the letter sent to the registered agent was returned October 29 marked as undeliverable. The other three letters have not been returned and are presumed to have been delivered. The Respondent has not responded to the Region's letter.

On November 14, 2001, the General Counsel filed with the Board a Motion for Summary Judgment. The General Counsel requests that the Respondent's answer to the complaint be considered withdrawn pursuant to the terms of the settlement agreement. The General Counsel also requests that the Board issue an order "providing a full remedy as to the conduct alleged in the complaint, including, but not limited to, preferential hiring with backpay fixed in the amount of \$7977 for Robert Clerihew and \$7980 for Jeffrey Carlson, plus interest accruing

¹ All subsequent dates are 2001 unless otherwise noted.

since the date of the approval of the settlement agreement.”

On December 12, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

According to the uncontroverted allegations in the Motion for Summary Judgment, the Respondent initially filed an answer and later entered into a settlement agreement providing that, if the Respondent failed to make any installment payment required by the agreement and failed to correct any such noncompliance within 10 days of the payment’s due date, the answer would be considered withdrawn. As set forth above, the Respondent has failed to comply with the terms of the settlement agreement. Consequently, pursuant to the provision of the settlement agreement described above, we find that the Respondent’s answer has been withdrawn and that all the allegations in the complaint are true.

Accordingly, we grant the General Counsel’s Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Washington corporation, with an office and place of business in Vancouver, Washington, has been engaged as a contractor in the construction industry doing commercial construction. During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, purchased and caused to be transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of \$50,000 directly from sources outside the state or from suppliers within the state, which suppliers obtained goods and materials directly from outside the state. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Gene Solias, John Frech, and Scott Little have been supervisors of the Respondent within the meaning of Section 2 (11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act.

(a) On about June 30, 2000, the Respondent, acting through John Frech, at Respondent’s Safeway jobsite in Vancouver, Washington, informed an applicant for employment that the Respondent would not hire him because of his activities on behalf of the Union.

(b) On about June 29, 2000, the Respondent refused to hire employee-applicant Jeffrey Carlson.

(c) On about June 30, 2000, the Respondent laid off, and since said time has refused to recall, its employee Robert Clerihew.

The Respondent engaged in the conduct described in (b) and (c) above because Carlson and Clerihew assisted the Union and engaged in concerted activities, and in order to discourage other employees from engaging in these activities.

CONCLUSIONS OF LAW

1. By informing an applicant that the Respondent would not hire him because of his activities on behalf of the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By refusing to hire employee-applicant Jeffrey Carlson and by laying off and refusing to recall employee Robert Clerihew, the Respondent has been discriminating in regard to the hire, tenure, or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization. The Respondent has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) and (3) by refusing to hire employee-applicant Jeffrey Carlson and by laying off and refusing to recall Robert Clerihew, we shall order the Respondent to make them whole for loss of earnings and other benefits suffered as a result of the unlawful discrimination against them by paying Carlson \$7980 and Clerihew \$7947, less the amounts already paid to them, with interest accruing from the date of the settlement agreement as set forth in the noncompliance portion of the settlement agreement.

We shall also provide for the remedies typically imposed for the violations found. Contrary to our concurring colleague, we do not find the settlement agreement to be ambiguous. The settlement agreement provided that, in the event of noncompliance with the settlement agreement, the Board was empowered to issue an Order “providing *full remedy as to the conduct alleged in the Complaint*, with total backpay fixed . . .” (emphasis added). The noncompliance clause merely fixes the backpay at specific dollar amounts plus interest. The clause does not specify that backpay is the exclusive remedy, nor does the settlement agreement by its terms rule out our imposition of other traditional remedies. See *L.J Logistics, Inc.*, 339 NLRB 729 (2003). We therefore

deem it appropriate to include in the order the customary provisions of instatement, reinstatement, expungement, and notice posting to fully remedy the conduct alleged in the complaint.²

Therefore, we shall also order the Respondent to offer Jeffrey Carlson instatement to the job to which he applied and to offer Robert Clerihew full reinstatement to his former job or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges previously enjoyed.

The Respondent shall also be ordered to expunge from its files any reference to the unlawful refusal to hire Jeffrey Carlson or the unlawful layoff of and refusal to recall Robert Clerihew, and to notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Great Northwest Builder's LLC, Vancouver, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Informing employee applicants that it will not hire union members.
 - (b) Failing to hire an applicant because he assisted the Union and engaged in protected concerted activity.
 - (c) Laying off and refusing to recall from layoff an employee because he assisted the Union and engaged in protected concerted activity.
 - (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Remit to Region 19 payments of \$5432 and \$5399 to be disbursed to Carlson and Clerihew, respectively, in accordance with the July 10, 2001 settlement agreement, with interest.
 - (b) Within 14 days from the date of this Order, offer Jeffrey Carlson instatement to the position for which he applied, and offer Robert Clerihew full reinstatement to his former job, or if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, remove from its files any reference to the Respondent's unlawful refusal to hire Jeffrey Carlson or to the unlaw-

ful layoff of and refusal to recall Robert Clerihew, and within 3 days thereafter notify Carlson and Clerihew in writing that this has been done and that evidence of the unlawful conduct will not be used as a basis for future personnel action against them.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Vancouver, Washington facility, copies of the attached notice marked Appendix.³ Copies of the notice on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 29, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2005

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

² Member Schaumber agrees with Chairman Battista that it would be better practice for noncompliance clauses to state clearly and with specificity the relief that will be granted if there is noncompliance. He also agrees that the relief sought by the General Counsel is clearly appropriate in light of Respondent's failure to answer the General Counsel's motion or the Notice to Show Cause. He, however, does not find the language negotiated by the parties ambiguous.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

CHAIRMAN BATTISTA, concurring.

I concur in the result reached by colleagues, but I do not fully agree with their rationale.

The noncompliance clause of the settlement is not clear as to what, if any, remedy beyond specified backpay is to be granted if there is noncompliance with the settlement. The phrase “full remedy” does not answer the question. In my view, the General Counsel should specifically spell out all of the relief that will be granted if there is noncompliance, or, at the very least, he should make it clear that backpay is not the only relief to be granted. Thus, if this case turned entirely on the settlement, the ambiguity would cause me to limit the remedy to backpay.

However, the General Counsel, after noncompliance, filed a Motion for Summary Judgment. That motion sought a remedy that “include[ed], but was not limited to, preferential hire and backpay.” The Respondent did not answer the motion or the Notice to Show Cause.

In these circumstances, I would grant the relief sought by the General Counsel.

Dated, Washington, D.C. June 30, 2005

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT inform employee-applicants that we will not hire them because of their activities on behalf of a union.

WE WILL NOT refuse to hire employee-applicants because they engaged in protected concerted activity and assisted a union.

WE WILL NOT lay off and refuse to recall employees because they engaged in protected concerted activity and assisted a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board’s Order, offer Jeffrey Carlson instatement to the job for which he applied, and offer Robert Clerihew full reinstatement to his former job or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make Jeffrey Carlson and Robert Clerihew whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to hire Jeffrey Carlson or unlawful layoff of and refusal to hire Robert Clerihew, and within 3 days thereafter notify Clerihew and Carlson in writing that this has been done and that evidence of the unlawful layoff and the refusal to hire will not be used as a basis for future personnel action against them.

GREAT NORTHWEST BUILDERS, LLC